GRAYS CARGO SDN. BHD.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN YAHYA J
[CRIMINAL APPLICATION NO. 44-3 OF 1989]
2 MAY 1989

CRIMINAL PROCEDURE: *Employees Provident Fund Act - Charge under s. 16(A)(1) - Plea of guilty - Order for payment of contribution - No order for imprisonment in default of payment - Whether at return date Magistrate was functus officio - Motion for revision s. 16(A)(1) - Subsection 4 - Provision for recovery of unremitted contribution - Section 283 of the Criminal Procedure Code - Whether available as optional procedure for Court to enforce payment.*

Grays Cargo Sdn. Bhd., was charged under s. 16(A)(1) of the Employees Provident Fund Act and the petitioner who appeared as a representative of the company pleaded guilty to all six charges under the Act. The Magistrate ordered the payment of unremitted contributions, but made no order as to imprisonment in default of the payment. On the subsequent mention date, the instalment payments were not forthcoming, and the petitioners Counsel raised the objection that as no provision was made for in-default imprisonment at the initial return date, the Magistrate was *functus officio.*

Held:

[1] The provision in s. 283(1)(b) does not compel the Magistrate to exercise his elective powers but clothes him with wide supplementary modes of enforcing his orders and to proceed to apply them one after the other whenever possible.

[2] The learned Magistrate was not *functus officio* and had acted within the power of Chapter XXVII of the Criminal Procedure Code when he sat further to enforce his order.

[3] The case is to be remitted to the learned Magistrate for his consideration and action in accordance with the Criminal Procedure Code.

[Order accordingly.]

Cases referred to:
PP v. Pontian Bas Berhad [1988] 2 MLJ 530
Lee Mun Foong v. PP [1976] 2 MLJ 16

Legislation referred to:
Criminal Procedure Code, ss. 283, (i)(b), (i)(b)(1), (i)(b)(2), (i)(b)(3), (i)(b)(4), (i)(f), (i)(c), 284, 426
Employees Provident Fund Act 1951, ss. 16A(1), (1)(c), (4), 18

For the applicant - Collin Goonting; M/s. Collin Goonting & Co.
For the respondent - Ng Aik Guan; DPP, Attorney-General Chambers

JUDGMENT

Wan Yahya J:

In the Court below, Grays Cargo Sdn. Bhd., was charged on 6 December 1988 under s. 16A(1) of the Employees Provident Fund Act 1951 (the Act). The petitioner who appeared as representative of the company pleaded guilty to all the six charges. In addition the learned trial Magistrate also ordered the payment of RM125,472 being contribution due to the Employees Provident Fund Board under s. 16A(4) of the Act in 12 monthly payments commencing from 1 January 1989. There was no order for the imprisonment in default of the payment made by the learned Magistrate. The Magistrate then fixed the case for further mention to 14 February 1989. The instalments were not paid and when the matter came up on that date before the learned Magistrate, petitioner's Counsel raised the objection that as no provision for in default imprisonment was initially made, the Magistrate was at that stage *functus officio.* At the conclusion of the hearing the learned Magistrate gave further time for the petitioner to settle the two unpaid instalments within two weeks. The petitioner did not pay the amount but moved a revision in this Court on 25 February 1989 for an order that:

(a) The petitioner be discharged for reason that the Magistrate is *functus officio* in this matter;

(b) that the learned Magistrate has no further jurisdiction after the conviction and sentence of the applicant's company;

(c) that payment of EPF contributions be made by the company so charged;

(d) alternatively that the sum of RM125,472 be paid on an extended period afforded by the said George Almeida Batholomew.

The above orders sought by the petitioner raised only one issue *viz.* Was the learned Magistrate *functus officio* after imposing the fine on 6 December 1988?

It may be expedient at this stage to consider the implication of the petitioner's conviction under s. 16A. Upon conviction under subsection (1) the petitioner was liable to a fine not exceeding two thousand dollars or imprisonment of twelve months or to both imprisonment and fine. In addition to the punishment, subsection (4) provides for the recovery of the unremitted contribution in the following words:

> (4) Upon being found guilty of an offence s. 16A(1)(c), the Court before which the employer is found guilty shall order such employer to pay to the board the amount of any contributions, together with any dividend credited thereon, due and payable to the board and certified by an officer authorised by the board to be due from such employer, prior to the date of such finding of guilt and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s. 426 of the Criminal Procedure Code.

My understanding of the above section is that once a person has been convicted for an offence under s. 16A(1)(c) of the Act, the Court is bound to make an order for the recovery of the unremitted contributions together with the interest thereon; and these sums can be recovered in the same manner as a fine. The effect of the last mentioned phrase is to make arrears of contribution retrievable in the same way as the Court would recover a fine. These are the procedures laid down in ss. 283

and 284 Criminal Procedure Code. These provisions of the Code will be exercisable by the Court in respect of recovery of the contribution. This same question was raised in the Supreme Court in *PP v. Pontian Bas Berhad* [1988] 2 MLJ 530.

Counsel for the petitioner submitted that the question as to whether s. 283(i)(b)(4) of the Code can have application in the enforcement of an order made under s. 16A(4) of the Act 1951 remained unanswered by the Supreme Court in that case.

I am unable to agree with this assertion. To my mind the answer was clearly provided in the last but one paragraph of the Supreme Court judgment which reads:

> We have no reason to differ from the views, no doubt expressed *obiter*, of the Federal Court in *Lee Mun Foong v. PP* at p. 18. That the Employees Provident Fund Act limits recovery of arrears of contribution only to those means available as in a civil debt, as the learned Judge (in *Pontian Bas Berhad v. PP*) seems to think, is further controverted by the words of s. 17(1) which states that all contributions payable under that Act may, without prejudice to any other remedy, be recoverable by the board summarily as a civil debt.

The relevant part of above cited case, as expressed *obiter*, by the same Court reads:

> What the section in my view, does seek to do is to enable the Court, on conviction of a person for an offence under this Act, to vary the punishment in accordance with the quantum received as gratification because corruption is a species of offence where the enormity of the sum or sums received as gratification may otherwise make any sentence or fine imposed on conviction under other punishment sections quite inadequate, in its deterrent effect. Thus where the amount is small the additional imposition will be correspondingly small. However, with larger amounts the penalty which that section prescribes shall be recoverable as a fine, enables the Court instead of imposing a term of imprisonment in lieu (which is restricted by s. 283(i)(c) of the Criminal Procedure Code where the offence is punishable with imprisonment exceeding 2 years to only one quarter of the maximum term of imprisonment), to cause instead the accused to disgorge pecuniarily under s. 283(i)(b)(3) of the Criminal Procedure Code where by the issue of a warrant for the levy of the amount of the penalty by distress and sale of any property belonging to the accused the deterrent effect will be greatly increased.

The underlined words as I read it indicate that s. 283 of the Criminal Procedure Code is an optional procedure for the Court to enforce payment. The Court can either enforce payment by the threat of an in default imprisonment, which in this case is restricted to 6 months imprisonment under s. 283(i)(b)(2), or issue a warrant to levy the amount under s. 283(i)(b)(3).

In the first aforementioned judgment of the *Pontian Bas* case the Supreme Court had distinctly answered the question when it stated that the findings of the learned High Court Judge is 'controverted' by the words of s. 17(1).

The learned Magistrate in our present case was adopting exactly the same procedure as expressed *obiter* in *Lee Mun Foong's* case (*supra*). Instead of imposing an indefault term he had opted to exercise his power under s. 283(i)(b)(2) of the Code and then when the fine was still unpaid he mercifully gave further time, as he was so entitled to act, under s. 283(i)(b)(1).

I can only assume, since the proceedings have been halted by the petitioner's present application, that if the petitioner had continued to default payment the learned Magistrate would have acted under s. 283(i)(b)(3) or (4).

The next question that may be raised is, could he continue to exercise any of the remaining powers given to him under s. 283(i)(b) of the Code after he had exercised one of them i.e., to direct payment by installments. Is he *functus officio*, as Counsel puts it, the moment he had imposed the order of payment of the RM125,000 or by implications, the additional fine?

The answer to my mind lies in s. 283(i)(b) itself where it was provided that the Magistrate can do 'all or any' of the five specified procedures. The Legislature would not have used the expression 'all' if it had intended that the exercise of one such power would make the Magistrate *functus officio*. Again if it is argued that the intention is to allow the Magistrate to resort to all of them at the same time, then I cannot envisage how a Magistrate could give time and yet issue a warrant for levy by distress; or direct payment by instalment and yet direct the person be 'searched'. Clearly the provisions in that section is not to compel the Magistrate to exercise his elective powers but to clothe him with a wide supplementary modes of enforcing his orders and to proceed to apply them one after the other whenever possible.

I find further justification of this view from the proviso to s. 283(i)(b)(4) of the Code which reads:

> Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued **in the first instance** unless it appears to the Court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment; (Emphasis mine).

The term 'in the first instance' clearly shows that the Legislature did not intend that imprisonment terms in default of payment of fine should be imposed initially but subsequently in certain circumstances.

Yet another illustration of the succeeding power given to Magistrate in enforcing his orders is found in s. 283(i)(c), s. 283(i)(f) of the Code which provides:

> if, before the expiration of the time of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the time of imprisonment suffered in default of payment is not less than proportional to the part of the fine unpaid, the imprisonment shall terminate;

Similar provision as to such subsequent or succeeding power of the Magistrate is again reflected in s. 284 which authorises him to suspend for 15 days the execution of a sentence of imprisonment in default of payment of fine and if no fine was paid by then, to direct the sentence of imprisonment to be carried out.

In my view a Magistrate, when so authorised under Chapter XXVII of the Criminal Procedure Code, may subsequently exercise succeeding powers to enforce his orders. The mere exercise of this function of enforcing the recovery of fine does not make him *functus officio* but he could be so if, having imposed the fine or imprisonment, he changes the amount of the fine or the term of imprisonment at a subsequent sitting.

Therefore my answer to the petitioner's application in respect of order in (a) & (b) above is that the learned Magistrate was not *functus officio* and had acted within the power of Chapter XXVII of the Code when he sat further to enforce his order.

Ground (c), although it appears on the amended petition, was not canvassed at the hearing before me. The answer no doubt lies within the meaning of s. 18 of the Employees Provident Fund Act 1951. However as Counsel for the petitioner had indicated that he would rest his application on the question of *functus officio,* I do not propose to make any order on this now. As to ground (d) in the petition, the prayer concerns the very subject matter, considered and pending before the learned Magistrate when it was intercepted by this application for revision. I therefore order that this case be remitted to the learned Magistrate for his consideration and action in accordance with the Criminal Procedure Code.

Also found at [1990] 1 CLJ 774